

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,	}	
	}	
Plaintiff,	}	Case No. 2:13-cr-00269-LDG-GWF
	}	
vs.	}	<u>FINDINGS &</u>
	}	<u>RECOMMENDATIONS</u>
ENRIQUE IVAN ROCHA,	}	
	}	Motion to Dismiss for Outrageous
Defendant	}	Government Conduct (#32)
	}	

This matter is before the Court on Defendant's Motion to Dismiss for Outrageous Government Conduct (#32), filed on July 22, 2014. The Government filed its Response (#34) on August 4, 2014. Defendant filed his Reply (#35) on August 11, 2014. The Court conducted a hearing in this matter on August 21, 2014.

BACKGROUND

Defendant Enrique Rocha is charged with using a facility of interstate commerce to knowingly persuade, induce, and entice, and to attempt to knowingly persuade, induce and entice an individual who has not attained the age of 18 years to engage in any sexual activity for which any person can be charged with a criminal offense under federal, state or local law, in violation of 18 U.S.C. § 2422(b). *Indictment (#1)*. The indictment is based on the allegations set forth in the Application and Affidavit for Search Warrant prepared by Detective Wayne Nichols of the Henderson, Nevada Police Department on June 4, 2013. *Defendant's Motion (#32), Exhibit A*.

As part of his duties, Detective Nichols is assigned to investigate computer crimes, including crimes involving child sexual abuse, child pornography, and internet crimes against children. On May 22, 2013, Detective Nichols, posing as a fourteen year-old female, initiated

1 email contact with Defendant Rocha who had allegedly posted a “casual encounter” advertisement
2 on Craigslist.com stating that he was looking to meet a female for sexual contact. The
3 advertisement was titled “Looking for any type girl ASAP.” The advertisement included the
4 Defendant’s telephone number and stated “that he was open to anyone.” Detective Nichols stated:
5 “Through training and experience, Craiglist has been a forum where adults are posting ads in hopes
6 of initiating communication with juveniles.” *Exhibit A*, pg. 00122. Detective Nichols states in his
7 affidavit:

8 On 5/22/13, I responded to the ad from an email account created
9 strictly for the purpose of undercover operations as this one. The first
10 email I sent was simply an introduction, asking if he was interested in
someone a lot younger. Shortly later, the subject replied, asking how
much younger if I had a picture.

11 I then advised the subject that I was a 14 year old female.
12 Throughout my communication with the subject my age was
continuously cited both literally and in the theme of our
13 communication. During the course of communication, the subject
firmly acknowledged my age and continued to engage me in
14 conversation, even sexual conversation at times.

15 In regard to acknowledging my age, the subject’s first response was
his concern of me being “illegal” and his concern of being involved
16 with a law enforcement operation. The subject also asked if I would
be able to text. It was then that I provided him with my undercover
17 cell phone number. After doing so, the subject stated that he was
interested but wanted to speak with me on the phone -- adding he just
18 wanted to hear my voice.

19 *Id.*, pg. 00122.

20 After additional text messages, Detective Nichols arranged to speak with the Defendant by
21 telephone on May 22, 2013 using a voice modification device to make his voice sound like a
22 juvenile female. Detective Nichols was unable to activate his external recording device, so there is
23 no recording of the telephone conversation. *Id.*, pg. 00123. Detective Nichols described this
24 telephone conversation as follows:

25 The male subject answered and we communicated for approximately
26 7 minutes. During the phone call, the subject asked numerous times
if I was really 14, to which I stated yes. He also stated his concern
27 that he could be involved in a law enforcement operation. When
asked of my name, I advised him my name was Samantha. He
28 claimed his name was “Vans”. The subject also asked if I would be
able to text him, to which I expressed that was my preferred method

1 of communication, citing my aunt and my fear that she would hear
2 me communicating on the phone. Before hanging up, the subject
made clear that he was interested and was going to text me.

3 *Exhibit A*, pg. 00123.

4 All subsequent communications between Detective Nichols, acting in the role of
5 “Samantha,” and Defendant occurred by electronic text communications.¹ Defendant requested a
6 photograph of the female and Detective Nichols, in return, requested a photograph of the
7 Defendant. Defendant sent photographs of himself to Detective Nichols by text message.
8 Detective Nichols sent Defendant forensically regressed images of a female police officer to make
9 her appear to be a fourteen year old female. *Id.*, pg. 00123.

10 Detective Nichols subsequently agreed to meet Defendant in the parking lot of a Subway
11 Sandwich shop which “she” stated was near “her” residence. After Defendant did not appear at the
12 initial rendezvous on May 24, 2013, the two agreed to meet on the evening of May 25, 2013.
13 Defendant sent a text message to Detective Nichols at 9:52 p.m. stating that he had arrived at the
14 meeting location. Detective Nichols asked Defendant to send him a photograph to prove he was at
15 the location. The Defendant did so. Through examination of the photograph and the digital data
16 associated with the photograph, the police were able to determine that Defendant was at the
17 intended meeting location. The Defendant also called Detective Nichols’s undercover phone
18 number several times during the time he stated he was at the meeting location. Detective Nichols
19 responded to Defendant’s text message by advising that he was unable to sneak out of his house.
20 *Id.*, pg. 00126. The police subsequently obtained a search warrant for Defendant’s residence.
21 Defendant arrived home during the execution of the warrant. He was read his *Miranda* rights and
22 agreed to speak to the police. Defendant allegedly admitted his participation in the foregoing
23 conduct. *Id.*

24 Defendant moves to dismiss the indictment on the grounds that Detective Nichols engaged
25 in outrageous conduct. Defendant argues that his initial Craigslist advertisement stated only that he
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27 ¹ A readable transcript of those communications has been filed by the Defendant. *See Supplement*
28 *to Motion to Dismiss for Outrageous Government Conduct* (#38), *Exhibit I*.

1 was “[l]ooking for any type girl” and that it was Detective Nichols who implanted the idea of
 2 Defendant having sexual relations with a fourteen year-old female by posing as such in his
 3 undercover response to the advertisement. Defendant argues that Detective Nichols made
 4 statements and engaged in techniques that sought to overcome his reluctance, concern or inaction in
 5 regard to engaging in the proposed contact. The Government argues, however, that Defendant was
 6 made aware at the outset of the communications that the person he was communicating with was a
 7 fourteen years old female, and that Defendant made clear during the ensuing communications his
 8 desire and willingness to engage in sexual activity with the female, culminating in his overt act of
 9 going to the proposed meeting location.

10 DISCUSSION

11 Dismissal of an indictment based on outrageous government conduct in violation of the Due
 12 Process Clause, requires a finding that the government’s conduct was so grossly shocking and
 13 outrageous as to violate the universal sense of justice. *United States v. Hullaby*, 736 F.3d 1260,
 14 1262 (9th Cir. 2013), citing *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991). *United*
 15 *States v. Black*, 733 F.3d 294, 302 (9th Cir. 2013) states that “[o]utrageous government conduct
 16 occurs when the actions of law enforcement officers or informants are ‘so outrageous that due
 17 process principles would absolutely bar the government from invoking judicial processes to obtain
 18 a conviction.’ *United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 36 L.Ed.2d 366
 19 (1973).” *Black* further states:

20 Dismissing an indictment for outrageous government conduct,
 21 however, is “limited to extreme cases” *in which the defendant can*
 22 *demonstrate* that the government’s conduct “violates fundamental
 23 fairness” and is “so grossly shocking and so outrageous as to violate
 24 the universal sense of justice.” [*United States v. Stinson*, 647 F.3d
 25 1197, 1209 (9th Cir. 2011).] This is an “extremely high standard.”
 26 *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993)
 27 (quoting *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991)
 28 (internal quotation marks omitted). Indeed, there are only two
 reported decisions in which federal appellate courts have reversed
 convictions under this doctrine. See *United States v. Twigg*, 588 F.2d
 373 (3d Cir. 1978); *Greene v. United States*, 454 F.2d 783 (9th Cir.
 1971). See also *State v. Lively*, 130 Wash.2d 1, 921 P.2d 1035
 (1996) (reversing drug conviction under state law, but relying on
 federal cases in finding outrageous government conduct.

733 F.3d at 302. (emphasis added).

1 Defendant Rocha argued at the hearing on this motion that *Black* shifts the burden of proof
2 to the Government to show that it has not engaged in outrageous government conduct. Although
3 not clearly articulated, Defendant's assertion is presumably based on the defendant making some
4 threshold showing of improper government conduct which triggers the Government's burden. As
5 the above passage indicates, however, nothing in *Black* supports Defendant's assertion. Early in
6 the decision, *Black* also stated that "the defendants have not met the 'extremely high standard,'
7 *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993), of demonstrating that the facts
8 underlying their arrest and prosecution are 'so extreme' as to 'violate[] fundamental fairness' or are
9 'so grossly shocking . . . as to violate the universal sense of justice,' *United States v. Stinson*, 647
10 F.3d 1196, 1209 (9th Cir. 2011)." 733 F.3d at 298. It is clearly Defendant's burden to prove that
11 Detective Nichols engaged in outrageous conduct that would justify the dismissal of the indictment
12 on due process grounds.

13 *Black* states that "[t]here is no bright line dictating when law enforcement conduct crosses
14 the line between acceptable and outrageous, 'so every case must be resolved on its own particular
15 facts.'" *Id.* at 302, quoting *United States v. Bogart*, 783 F.2d 1428, 1438 (9th Cir. 1986), *vacated*
16 *on other grounds sub nom*, and *United States v. Wingender*, 790 F.2d 802 (9th Cir. 1986) (order).
17 The court noted that it has set forth certain ground rules that provide some guidance in evaluating
18 motions to dismiss based on outrageous government conduct. For example, it is outrageous
19 conduct for government agents to engineer and direct a criminal enterprise from start to finish. *Id.*
20 citing *United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir. 2008). It is outrageous for the
21 government to use excessive physical or mental coercion to convince an individual to commit a
22 crime. *Id.* citing *United States v. McClelland*, 72 F.3d 717, 721 (9th Cir. 1995). It is outrageous
23 for the government to generate new crimes merely for the sake of pressing criminal charges. *Id.*
24 citing *United States v. Emmert*, 829 F.2d 805, 812 (9th Cir. 1987). It is not outrageous, however, to
25 infiltrate a criminal organization, to approach individuals who are already involved in or
26 contemplating a criminal act, or to provide necessary items to a conspiracy. *Id.*, citing *United*
27 *States v. So*, 755 F.2d 1350, 1353 (9th Cir. 1985). It is also not outrageous for the government to
28 use "artifice and stratagem to ferret out criminal activity." *Id.*, citing *Bogart*, 783 F.2d at 1438.

1 *Black* also noted that the court has identified certain factors (referred to as the “*Bonanno*
2 factors” after *United States v. Bonnano*, 852 F.2d 434, 437-38 (9th Cir. 1988)) as relevant to the
3 determination whether the government’s conduct was outrageous. These include: (1) the known
4 criminal characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the
5 government’s role in creating the crime of conviction; (4) the government’s encouragement of the
6 defendants to commit the offense conduct; (5) the nature of the government’s participation in the
7 offense conduct; and (6) the nature of the crime being pursued and necessity for the actions taken in
8 light of the nature of the criminal enterprise at issue.² *Black*, 733 F.3d at 303. The court noted that
9 these factors have not been used consistently or as a dispositive test. The court further stated:
10 “Because we are to resolve every case on its own particular facts, we take account of the *Bonanno*
11 factors in our analysis but only as part of our consideration of all the circumstances as a whole.”
12 *Id.*, at 304 n. 7. Consistent with *Black*, the district court in *United States v. Sapper*, 2013 WL
13 4857775, *2 (D.Nev. Sept. 10, 2013), held that the *Bonanno* factors are not a mandatory checklist,
14 each element of which must be satisfied in order for the government’s conduct to be considered
15 proper. *Sapper* states that “[t]o read *Bonanno* as providing a five-part test that the government
16 must satisfy would also impermissibly shift the burden to the government to demonstrate
17 ‘legitimate government activity.’” *Id.* 2013 WL 4857775, at *3.

18 The facts of this case are similar to those in *Sapper* in which the same detective posed as a
19 fourteen year-old girl named “Vanessa” in responding to a Craigslist personal ad posted by the
20 defendant which sought a sexual encounter with a female, but did not specify any desired age. As
21 in this case, Detective Nichols responded to the ad by asking whether defendant would be
22 interested in someone younger. The defendant responded affirmatively. During the ensuing
23 exchange of emails or text messages, the defendant discussed engaging in sexual conduct with
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25 ² *Bonanno* stated that “[t]he government’s conduct is permissible when: (1) the defendant was
26 already involved in a continuing series of similar crimes, or the charged criminal enterprise was already in
27 progress at the time the government agent became involved; (2) the agent’s participation was not necessary
28 to enable the defendants to continue the criminal activity; (3) the agent used artifice and stratagem to ferret
out criminal activity; (4) the agent infiltrated a criminal organization; and (5) the agent approached persons
already contemplating or engaged in criminal activity.” 852 F.2d at 437-38.

1 Vanessa who continuously indicated that she was fourteen years old. The defendant ultimately
2 arranged to meet with Vanessa near a Subway sandwich store and was taken into custody after he
3 arrived at the meeting location. *Sapper*, 2013 WL 4857775 at *7-8.

4 The district court in *Sapper* rejected the defendant's argument that it was improper for
5 Detective Nichols to respond to the defendant's ad by posing as a fourteen-year-old female when
6 there was no reason to suspect that the defendant was interested in pursuing sexual contact with an
7 underage female. The court cited *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993)
8 and *United States v. Luttrell*, 889 F.2d 806, 812 (9th Cir. 1989) ("*Luttrell I*"), *rev'd en banc*, 923
9 F.2d 764 (9th Cir. 1991) ("*Luttrell II*") for the proposition that law enforcement agents are not
10 required to have reasonable suspicion or "reasoned grounds" for investigating a particular
11 individual for criminal activity. *Sapper*, 2013 WL 4857775, at *5, *9. The court also cited other
12 cases in which courts have rejected the argument that an undercover officer acted outrageously or
13 improperly by posing as an under-aged female in response to a Craigslist ad or in an internet chat
14 room. *Id.* at *6, citing *United States v. Cruz*, 2013 WL 3833033 (E.D.Cal. Jul. 23, 2013) (denying
15 motion to dismiss indictment for enticement of a minor where the defendant's initial Craigslist
16 posting specifically requested "over 18" contact, defendant continued to pursue sexual relationship
17 with the undercover responder he believed to be a 13-year-old girl, and defendant arranged to meet
18 her at a fast-food restaurant where he was ultimately arrested); and *State v. Cunningham*, 808
19 N.E.2d 488, 492 (Ohio Ct.App. 2004) (officer posing as 14-year-old girl in an internet chat room
20 did not engage in outrageous conduct where he merely gave the defendant the opportunity to solicit
21 sex from a person who he believed was a fourteen-year-old minor).

22 Whether or not legally required, Detective Nichols had a reasonable investigative basis for
23 responding to Defendant Rocha's ad in the guise of a fourteen year-old female. As stated in his
24 affidavit, Detective Nichols was aware that Craigslist has been used as a forum where adults post
25 ads in the hopes of initiating communications with juveniles. Defendant's ad stated that he was
26 "Lookin for any type girl ASAP" and "that he was open to anyone." *Exhibit A*, pg. 00122.
27 Although these statements did not necessarily indicate that he was seeking an underage female for
28 sexual activity, they raised that possibility and provided a reasonable basis for Detective Nichols to

1 determine if Defendant would, in fact, pursue such illegal conduct. Defendant could have elected
2 to terminate the communications once he was made aware that the person with whom he was
3 communicating was only fourteen years old. Instead, Defendant allegedly continued with the
4 communications, engaged in explicit discussions of hoped-for or anticipated sexual intercourse
5 with the responder, and ultimately agreed to and proceeded to a rendezvous location.

6 “The extent to which the government encouraged a defendant to participate in the charged
7 conduct is important, with mere encouragement being of lesser concern than pressure or coercion.”
8 *United States v. Black*, 733 F.3d at 308, citing *United States v. Mayer*, 503 F.3d 740, 755 (“There is
9 no evidence in the record that any coercive relationship existed between Mayer and [agent]
10 Hamer.”); *United States v. McClelland*, 72 F.3d 717, 721 (9th Cir. 1995) (rejecting outrageous
11 conduct claim but noting that the government agent “did encourage McClelland at various times”);
12 *Shaw v. Winters*, 796 F.2d 1124, 1125 (9th Cir. 1986) (“While there is no evidence that Shaw had
13 dealt in food stamps before, once they were available he purchased them willingly and without
14 pressure.”). The text messages in this case show that it was the Defendant who initiated the
15 discussion of having sex and who made explicit statements to the undercover officer about what
16 would occur during the sexual encounter. *See e.g. Supplement (#38) Exhibit I*, pg. 371.

17 Defendant argues Detective Nichols pressured him to arrange a time for them to meet, and
18 steered the discussion away from a mere titillating conversation about sex to a discussion of when
19 they would meet to engage in sexual relations. The text communications do not support this
20 interpretation. While the detective initially raised the question “so when does this go down and
21 where?”, *Id.*, pg. 372, Defendant promptly responded “Lol u tell me.” *Id.* Defendant also asked the
22 female for her address. *Id.*, pg. 373. Defendant’s statements regarding sexual conduct were also
23 made in the context of what would occur when they met, including a discussion of whether the
24 female would perform oral sex and the use or non-use of condoms during intercourse. *Id.*, pg. 372-
25 73. Defendant’s statements also clearly indicated his desire to meet with the female while
26 discussing the sexual activity that would occur. *Id.*, pg. 374. Defendant asserts that the detective
27 chided or ridiculed him for not keeping their initially agreed-upon meeting on May 24, 2013 and
28 cites this as evidence of improper pressure or coercion. *See Supplement to Motion to Dismiss*

1 (#38), *Exhibit I* (transcript of electronic text communications), pg. 379. The text communications
2 on May 25, 2013 show, however, that after Defendant apologized for not keeping their earlier
3 planned meeting, the detective stated: “its cool. but im not gonna get my hopes up 2 meet.”
4 Defendant promptly responded: “Well I’m at Buffalo Wild Wings and I wana **** babe I been
5 thinking of you a lot.” *Id.*, pg. 379. From this exchange at 7:01 p.m., the Defendant and the
6 detective exchanged communications until after 10:00 p.m to arrange to meet at a location near the
7 female’s house. Once it was clear that Defendant had arrived at the meeting location, however,
8 Detective Nichols told the Defendant that “she” could not sneak out of her house as planned
9 because “her” aunt woke up. *Id.*, pg. 379-381.

10 The record shows that Detective Nichols, in the role of Samantha, encouraged Defendant to
11 believe that she would meet with him for sexual activity. The record also shows that Detective
12 Nichols made statements to counter Defendant’s initial suspicion this might be a law enforcement
13 operation, or that Samantha might not be a “real person.” Other than his concern about a possible
14 law enforcement operation, Defendant did not express any reluctance about having illegal sexual
15 relations with an under-aged female. Nor did he demonstrate resistance to moving beyond a mere
16 discussion about sex to arranging an actual meeting at which such activity would occur. The Court
17 therefore finds that Detective Nichols did not exert any undue pressure or coercion to induce
18 Defendant into committing a criminal act.

19 The courts consider the various aspects of the government’s participation in the offense
20 conduct, including its duration and “the *nature* of the government’s participation--whether the
21 government acted as a partner in the criminal activity, or more as an observer of the defendant’s
22 criminal conduct--including any particularly offensive conduct taken by the officer during the
23 course of the operation.” *United States v. Black*, 733 F.3d at 308-09. In this case, Detective
24 Nichols, acting in the guise of an under-age female, participated in the proposed criminal activity
25 by agreeing to engage in sex with the Defendant. In this guise, Detective Nichols was also
26 portraying the potential victim of the crime. This is not the type of government participation in
27 criminal activity that raises a significant issue of outrageous conduct. *See e.g. United States v.*
28 *Stenberg*, 803 F.2d 422, 430-31 (9th Cir. 1986) (noting that government agents’ conduct in killing

1 wildlife as part of the undercover operation “raise[d] significant questions as to the extent to which
2 government agents may commit serious crimes in order to prevent others from committing similar
3 offenses”). Although not a precise match, Detective Nichols’ conduct is more akin to the passive
4 conduct of an undercover officer who agrees to purchase and receive illegal drugs or other
5 contraband from a trafficker, which generally does not provide grounds for finding outrageous
6 government conduct. *Id.*

7 The court also considers the need for the investigative technique in light of the challenges of
8 investigating and prosecuting the type of crime being investigated. *United States v. Black*, 733 F.3d
9 at 308-09. *Black* involved a “reverse sting” in which the undercover officers proposed the robbery
10 of a fictional drug stash house. The court noted that “stash house robberies are largely unreported
11 crimes that pose great risk of violence in residential communities. . . . The reverse sting tactic was
12 designed to avoid these risks to the public and law enforcement officers by creating a controlled
13 scenario that unfolds enough to capture persons willing to commit such an armed robbery without
14 taking the final step of an actual home invasion.” 733 F.3d at 309. The court recognized the
15 legitimate purposes of such operations, but stated that because of the risks of law enforcement
16 overreaching and ensnaring innocent individuals in criminal activity, the government does not have
17 free license to forego reasonable alternative investigative techniques of identifying and targeting
18 potential suspects before approaching them. *Id.* at 309-10.

19 It is in the nature of the subject crime that the victim agrees to participate in the prohibited
20 sexual conduct. The victim is not legally competent to consent, however, and society has
21 determined, through the enactment of criminal statutes, that he or she needs to be protected from
22 his or her own harmful decisions. Illegal sexual encounters between adults and barely adolescent
23 children also pose the risk of greater harm than the victims may have contemplated. Such crimes
24 are also likely to go unreported by the victims because of their own lack of judgment or because of
25 fear of punishment by their parents or guardians. Through sting operations such as those in this
26 case and *Sapper*, law enforcement officers are able to identify and interdict perpetrators of such
27 crimes before actual children are victimized. Where the internet site is one known by law
28 enforcement to be used for such illicit contacts, and so long as the law enforcement agents do not

1 engage in undue enticement or coercion of innocent individuals, this type of law enforcement
2 operation does not offend fundamental fairness and the universal sense of justice.

3 **CONCLUSION**

4 Based on the facts and circumstances of this case, Detective Nichols did not engage in
5 outrageous government conduct that justifies dismissal of the indictment on due process grounds.
6 Accordingly,

7 **RECOMMENDATION**

8 **IT IS RECOMMENDED** that Defendant's Motion to Dismiss for Outrageous
9 Government Conduct (#32) be **denied**.

10 DATED this 5th day of September, 2014.

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13 GEORGE FOLEY, JR.
14 United States Magistrate Judge
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